IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CHARLIE GLEN COOK PETITIONER
Criminal No. 3:89CR17-B

V. CAUSE NO. 3:94CV56-B

UNITED STATES OF AMERICA RESPONDENT

MEMORANDUM OPINION

This cause is presently before the court on the petitioner's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. Upon due consideration of the petitioner's motion, the record of the criminal case, and the exhibits submitted, the court finds the motion not well taken.

The petitioner was indicted on a second superseding indictment to 41 counts on or about March 8, 1989. After negotiations with the government, the petitioner agreed to plead guilty to three counts. The first count (Count Two) was a violation of the continuing criminal enterprise statute ("CCE"). 21 U.S.C. § 848. The remaining counts (Counts Thirty-nine and Forty) were tax evasion violations. 21 U.S.C. § 7201.

After accepting a guilty plea by the petitioner and conducting a pre-sentence investigation, the court sentenced the petitioner on October 3, 1989, to 24.3 years on Count Two and 5 years on each count of tax evasion, to be served concurrently. After five years of incarceration, the petitioner now seeks to undo what has been done.

The petitioner alleges a variety of grounds to vacate his conviction. Many of the petitioner's arguments are repetitive but can be consolidated into three areas: 1) ineffective assistance of counsel, 2) involuntary guilty plea, and 3) due process violation.

It should be noted at the outset that "[r]elief under 28 U.S.C § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). The petitioner did not appeal his conviction and therefore none of the issues raised herein were presented to the court of appeals on direct appeal. In United States v. Shaid, 937 F.2d 228 (5th Cir. 1991), the Fifth Circuit noted that the United States Supreme Court has emphasized repeatedly that a collateral challenge may not do service for an appeal, citing United States v. Frady, 456 U.S. 152, 164, 71 L. Ed. 2d 816 (1982). "After conviction and exhaustion or waiver of any right to appeal, we are entitled to presume that [the defendant] stands fairly convicted." Frady, 456 U.S. at 164. Accordingly, a defendant can challenge his conviction after it is presumed final only on issues of constitutional magnitude, United States v. Hill, 368 U.S. 424, 7 L. Ed. 2d 417 (1962), and cannot raise an issue for the first time on collateral review without showing both cause for procedural

default and actual prejudice resulting from the asserted error. Frady, 456 U.S. at 166.

The court finds that all the issues raised by the petitioner, except the assertion of ineffective assistance of counsel, are procedurally barred. Nevertheless, the court will briefly discuss each issue.

INEFFECTIVE ASSISTANCE OF COUNSEL

In gauging whether counsel effectively assisted the petitioner during the trial, plea or sentencing stages, the court is guided by the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). Strickland requires that a habeas corpus petitioner establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that the deficient representation prejudiced the defense so much that the results of the proceeding would have been different. Strickland, 466 U.S. at 687-88; United States v. Samples, 897 F.2d 193, 196 (5th Cir. 1990). In the context of a guilty plea case, the second element requires that the petitioner prove that but for his counsel's errors, he would not have pleaded guilty and would have insisted on trial. Hill v. Lockhart, 474 U.S. 52, 59, 88 L. Ed. 2d 203 (1985). The petitioner must show that there is a reasonable probability that but for counsel's error, the outcome of the proceedings would have been different. Strickland, 466 U.S. at

694. A petitioner's failure to establish either prong of the test warrants rejection of the claim. Bates v. Blackburn, 805 F.2d 569, 578 (5th Cir. 1986), cert. denied, 482 U.S. 916 (1987).

The majority of the petitioner's claims center around the alleged improper use of the 1989 edition of the United States Sentencing Commission Guidelines Manual ("USSG") and the failure of counsel to raise various objections to the same. It is the petitioner's position that the 1988 manual should have been used and that his base offense level in that edition was only a 32 whereas the 1989 manual reflected a base offense level for a CCE charge of 36. The petitioner is correct in stating that the 1988 edition of the manual is the proper manual to use based on his sentencing date of October 3, 1989. However, the record clearly reflects that the 1988 edition was in fact used and a proper base offense level of 36 was attributed to the petitioner. The court notes that the 1987 edition of the USSG reflects a base level offense of 32 for the corresponding quantity and this may be the source of the petitioner's confusion. Accordingly, all allegations of deficiencies of the petitioner's counsel for not raising the application of the wrong guidelines are without merit.

The petitioner also contends that his counsel failed to fully explain the ramifications of the USSG and the acknowledgment page of the plea agreement he signed. These assertions are clearly contradicted by the record in the criminal case. At the plea

colloquy, the petitioner admitted to understanding all the aspects of the plea agreement, including an explanation of the acknowledgement page. Moreover, the petitioner has wholly failed to produce evidence of a deficiency on the part of his counsel, and there is no evidence whatsoever that even if there were, that the petitioner was prejudiced by the same. Thus, the petitioner has failed to satisfy the Strickland two-pronged test.

INVOLUNTARY PLEA

The petitioner couches his next argument both in terms of the validity of his plea and in the ineffectiveness of his counsel for not objecting thereto. The petitioner claims that the government breached the plea agreement by failing to recommend the statutory minimum sentence on the CCE charge. In the plea agreement, the petitioner agreed to, among other things, give full and truthful statements to any assigned agents as to all knowledge he may have of other persons who participated in any way in these and all related offenses and to give full and truthful testimony before any federal grand juries and trial juries which may subpoena him. In exchange, the government agreed to recommend, pursuant to Rule 11(e)(1)(B), that the sentence on Count Two be ten years without parole and that any sentences of imprisonment on Counts Thirty-Nine and Forty be concurrent thereto. The agreement also recognized that the court is not bound by any recommendation and that if the defendant violated the agreement, any statements made pursuant thereto would be admissible against him.

At sentencing, the guideline range called for a sentence of from 292 months to 365 months, well above the mandatory minimum of ten years. The government did not request a departure from this guideline range because the petitioner had not fulfilled his obligations under the plea agreement. The record is clear that the petitioner refused to testify against his source. Indeed, this

court in denying (after a hearing) a motion for reduction of sentence noted that it "is uncontradicted that even though the defendant says that he is willing to cooperate and provide substantial assistance to the government he nevertheless appears to be unable to do so because of lack of knowledge or memory concerning facts which would constitute substantial assistance if relayed to the government." Order Denying Motion for Reduction of Sentence, January 25, 1994. Thus, the "failure of the defendant to fulfill his promise to cooperate and testify fully and honestly releases the government from the plea agreement." United States v. Ballis, 28 F.3d 1399, 1410 (5th Cir. 1994) (internal quotation marks omitted); see also Hentz v. Hargett, 71 F.3d 1169, 1176 (5th Cir. 1996).[1]

Although the petitioner does not expressly request that his guilty plea be withdrawn, the court concludes that such relief should be denied. When the defendant has breached a plea agreement, a guilty plea entered pursuant to such an agreement need not be vacated, and the prosecution is freed from any further obligation to perform as promised. United States v. West, 2 F.3d 66, 70 (4th Cir. 1993); United States v. Tilley, 964 F.2d 66, 69-70 (1st Cir. 1992); United States v. Rivera, 954 F.2d 122, 124 (2d

[1]The petitioner also argues that his counsel should have appealed the refusal by the prosecution to move the court for a reduction of sentence. See USSG §5K1.1. For the reasons stated above any appeal on this issue would be without merit .

Cir. 1992); United States v. Fields, 906 F.2d 139, 143 (5th Cir. 1990); but see Innes v. Dalsheim, 864 F.2d 974 (2d Cir. 1988). Due process is satisfied if the guilty plea is voluntary. When it is the defendant, and not the prosecution, who breaches the plea agreement, the voluntariness of the plea is not placed in question because it is not the defendant who has acted in reliance on a false promise. Hentz, 71 F.3d at 1176. The plea colloquy clearly reflects that the petitioner's guilty plea was voluntary and made with full knowledge of the consequences. That the intended consequences were not fully realized was due entirely to the petitioner's repudiation of the agreement.

DUE PROCESS

The petitioner claims his due process was violated in two independent means as a consequence of a dismissed count of obstruction of justice. First, his offense level was enhanced two levels due to the obstruction of justice conduct. Second, he was denied an acceptance of responsibility based on a finding of obstruction of justice.

The defendant is precluded from raising the issue of an upward adjustment via a § 2255 motion. In United States v. Faubion, 19 F.3d 226, 232-33 (5th Cir. 1994), the Fifth Circuit reiterated the well-settled rule of that circuit that an attack on the district court's upward departure is not cognizable in a § 2255 action. Noting that § 2255 relief is reserved for errors of constitutional

dimension and other injuries that could not have been raised on direct appeal, the Faubion court explained that a challenge to an upward departure is outside of those parameters. Id. Moreover, in United States v. Perez, 952 F.2d 908, 909-10 (5th Cir. 1992), the Fifth Circuit held that challenges to a sentencing court's factual findings on the basis of which the sentencing court makes sentencing adjustments may not be raised in a § 2255 proceeding if they could have been raised on direct appeal. In any event, only in "extraordinary cases" will a prisoner receive both the obstruction penalty and maintain his entitlement to the acceptance of responsibility benefit. Faubion, 19 F.3d at 230. The petitioner's conduct does not qualify him for such a benefit.

For the foregoing reasons, the petitioner's motion to vacate, set aside, or correct his sentence will be denied. An order will issue accordingly.

THIS, the ___ day of June, 1996.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE